SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 728

SWITCHMEN'S UNION OF NORTH AMERICA;
GEORGE C. SLADE, AS GENERAL CHAIRMAN OF THE GENERAL ADJUSTMENT COMMITTEE OF THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY OF THE SWITCHMEN'S UNION OF NORTH AMERICA;
ARTHUR J. GLOVER, AS PRESIDENT OF THE SWITCHMEN'S UNION OF NORTH AMERICA;
JOHN J. KINMARTIN, AS PRESIDENT OF BUFFALO LODGE NO. 4, SWITCHMEN'S UNION OF NORTH AMERICA;
THOMAS L. JOYCE, AS GENERAL CHAIRMAN OF THE SWITCHMEN'S UNION OF NORTH AMERICA FOR THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, AND
HAROLD V. HEEB, AS LOCAL CHAIRMAN OF THE SWITCHMEN'S UNION OF NORTH AMERICA FOR THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY FOR THE BUFFALO DISTRICT,

vs. *Petitioners,*

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY;
THOMAS J. BRENNAN, AS PRESIDENT OF LACKAWANNA LODGE NO. 715, BROTHERHOOD OF RAILROAD TRAINMEN;
A. F. WHITNEY, AS PRESIDENT OF THE BROTHERHOOD OF RAILROAD TRAINMEN OF THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY;
J. P. CAWLEY, ACTING GENERAL CHAIRMAN OF THE GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF RAILROAD TRAINMEN OF THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY SYSTEM;
A. E. CUMBLER, AS PRESIDENT OF LOCAL LODGE NO. 715 OF THE BROTHERHOOD OF RAILROAD TRAINMEN OF THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY;
JOHN J. SHAUGHNESSY, AS GENERAL CHAIRMAN OF THE ORDER OF RAILWAY CONDUCTORS OF AMERICA FOR THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY;
BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Your petitioners, Switchmen's Union of North America, George C. Slade, as general chairman of the General

Adjustment Committee of the Delaware, Lackawanna & Western Railroad Company of the Switchmen's Union of North America, Arthur J. Glover, as president of the Switchmen's Union of North America, John J. Kinmartin, as president of Buffalo Lodge No. 4, Switchmen's Union of North America, Thomas L. Joyce, as general chairman of the Switchmen's Union of North America for the Delaware, Lackawanna & Western Railroad Company, and Harold V. Heeb, as local chairman of the Switchmen's Union of North America for the Delaware, Lackawanna & Western Railroad Company for the Buffalo District, respectfully pray that a writ of certiorari issue to review that part of the judgment of the Court of Appeals of the State of New York entered on January 24, 1952, affirming the judgment of the Appellate Division—Fourth Department—New York Supreme Court, which dismissed the counterclaim of petitioners, respondents-appellants in the court below.

Opinion Below

The opinion of the Court of Appeals of the State of New York is reported 303 N.Y. 411.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on January 24, 1952. The remittitur of said Court entered on January 24, 1952, was amended on March 13, 1952, to show that questions under the Federal Constitution had been presented and were necessarily passed upon herein. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Statement

This action seeking a declaratory judgment and an injunction was commenced against the respondent The

Delaware, Lackawanna & Western Railroad Company on August 8, 1946. The petitioners including Switchmen's Union of North America (hereinafter referred to as SUNA) were later impleaded as defendants (R. 43) and in their answer counterclaimed for a declaratory judgment (R. 54). From a judgment (R. 99) deciding the merits of the complaint and counterclaim, separate appeals were taken by plaintiffs and SUNA to the Appellate Division, New York Supreme Court, which reversed (278 App. Div. 886) the trial court and held, on authority of *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, that the state courts lacked jurisdiction of the controversy. To the Court of Appeals of the State of New York, plaintiffs appealed from that part of the judgment which dismissed their complaint, while petitioners herein appealed from that part of the judgment which dismissed their counterclaim (R. 639). The Court of Appeals on January 24, 1952, affirmed the judgment of the Appellate Division (303 N.Y. 411). The opinion is reproduced in the record, page 657.

The case involves the issue whether under collective bargaining agreements entered into by the railroad with representatives of its employees, those employees listed on the yardmen's seniority roster, or those listed on the roadmen's seniority roster, should be employed on a certain run or job in the railroad's Buffalo yard known as the "3 P.M. City Line job." Plaintiffs' complaint claims the job on seven days per week for roadmen, while the counterclaim of petitioners asserts it belongs to yardmen who are represented for collective bargaining purposes with the railroad by SUNA, the roadmen being represented by Brotherhood of Railroad Trainmen (BRT), the plaintiff union. The job is presently being manned during six days of the week by yardmen (switchmen) and on the seventh day by employees from the roster of roadmen.

Plaintiffs' (BRT's) claim to the job is derived from a contract made by BRT with the railroad in 1926 containing the agreement that certain jobs in the Buffalo yard should be included in the term "road service" and so handled by roadmen. Despite this contract, plaintiffs made no claim on behalf of roadmen to six days of the City Line job until 1937 when they contended that the character and nature of the work had changed from yard to road service, which contention was and has been denied by SUNA.

SUNA's claim to the job is based on findings made in a National Mediation Board election held in 1935, a letter written by the railroad to the BRT and SUNA on August 8, 1935, (R. 306, Ex. C) and most importantly on an agreement made in 1935 (R. 578, Ex. DD) between the railroad and SUNA providing that the SUNA would thereafter represent yardmen in the Buffalo district, and that the Buffalo yards would be included in the SUNA's then existing contract which in turn provided that all yard work within switching limits would be performed by switchmen (yardmen).

Efforts to compose differences over ~~the~~ status of the City Line job made since 1937 having proved fruitless, the BRT in 1944 submitted a claim to the National Railroad Adjustment Board presenting to that Board the identical meritorious issues presented in the instant litigation. In the submission to the Board the position of the employees represented by BRT is thus stated in part: "A job known as a 3 P.M. City-Line job advertised for yardmen is used to make at least two trips daily between East Buffalo and Buffalo. * * * This deprives roadmen of the work that is rightfully theirs." (R. 254, Ex. 2-B).

The Adjustment Board in its decision dated August 28, 1945, found that it had jurisdiction over the dispute. It decided "The question here involved should be adjusted

by and between the interested organizations, i.e., Brotherhood of Railroad Trainmen, Order of Railway Conductors and Switchmen's Union of North America, as it involves classification of service on run under what seems to this Division to be conflicting agreements and facts concerning the dispute." The award was "Case Dismissed". (R. 254 Ex. 2-B).

Subsequent attempts to adjust the controversy pursuant to the decision of the Adjustment Board were unproductive. This suit followed wherein plaintiffs in their complaint, and petitioners in their counterclaim, sought a judicial declaration as to whether yardmen or roadmen have the right to work on the City Line job.

The Court of Appeals of the State of New York sustained the judgment of the Appellate Division dismissing plaintiffs' complaint and petitioners' counterclaim on authority of *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, and *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561.

Question Presented

Do the decisions of this Court in *Order of Railway Conductors* v. *Pitney*, and *Slocum* v. *Delaware, L. & W. R. Co.*, *supra*, prevent a state court from taking jurisdiction of a dispute involving the interpretation or application of collective bargaining agreements on railways after the dispute has been presented to the National Railroad Adjustment Board and a Board award rendered declining to decide the dispute on its merits but referring the question to the parties for settlement?

Reasons for Granting the Writ

1. The Court of Appeals of the State of New York has decided a federal question of substance not heretofore determined by this Court.

2. The Court of Appeals of the State of New York has decided a federal question of substance probably not in accord with the decisions of this Court in *Order of Railway Conductors* v. *Pitney, supra; Slocum* v. *Delaware, L. & W. R. Co., supra; Washington Terminal Company* v. *Boswell,* 319 U. S. 732; and *Elgin J. & E. Railway Company* v. *Burley,* 325 U. S. 711, 327 U. S. 661.

BRIEF

As heretofore stated, the dispute which is the basis of this cause has been submitted to the National Railroad Adjustment Board under the provisions of Sec. 3 First (i) of the Railway Labor Act (45 U.S.C. Sec. 153 First (i)). (Relevant portions of the Act are quoted in the Appendix). The submission resulted in an award of "Case dismissed" and the Board's finding that the question here involved should be adjusted between interested organizations, to-wit, Brotherhood of Railroad Trainmen, Order of Railway Conductors, and Switchmen's Union of North America. The Board thus having declined to decide the case on its merits, it follows that unless jurisdiction exists in the courts to provide petitioners with the relief sought by them in their counterclaim, namely, a declaration that yardmen are entitled to the City Line job for seven days a week, there is no tribunal to which petitioners can have recourse. In absence of adjudication of the issues by a tribunal having jurisdiction, amicable procedures followed for many years by the parties having failed to yield a settlement, the only course to be pursued to bring about a disposition of the controversy may be a strike. This would produce a result opposed to the principal purpose of the Railway Labor Act which is to prevent interruptions to commerce, (45 U.S.C. Secs. 151, 152).

This case concerns the interpretation or application of contracts—a subject for the exercise of judicial power since the inception of our jurisprudence. Dismissal of the case by the courts below poses the question of the effect of decisions of this Court, principally in the *Pitney* and *Slocum* cases, upon the jurisdiction of courts to decide disputes over interpretation or application of railway collective agreements which have already had the attention of the National Railroad Adjustment Board. Dismissal of

the case by the state courts relegates the parties to resubmission of the dispute to the Adjustment Board which may persist in its declination to decide the issues, while the parties are without a means of compelling the Board to act on the merits. The lower court's consignment of the parties to further and probably futile recourse to the Adjustment Board can be justified only if the decisions of this Court are to be so construed as to hold that disputes of this character are within the exclusive province of the Adjustment Board, and can not be entertained by courts under any circumstances. We submit that at most this Court has held the Adjustment Board to possess "exclusive primary jurisdiction"; it has not barred resort to the courts in instances where the jurisdiction of the Adjustment Board has been invoked and a meritorious decision refused. The most informative of the decisions of this Court anent the power of courts to adjudicate disputes such as the instant one are cited in the section stating the reasons urged for granting the writ. We will comment on them briefly.

Washington Terminal Company v. *Boswell,* 124 F. 2d 235 (C.A. D.C. 1941), affirmed by a divided court, 319 U. S. 732, arose from a dispute involving interpretation of certain provisions of a railroad collective agreement. The *Boswell* suit was begun by the Washington Terminal Company to obtain a declaration regarding the rights of its employees under the agreement. The court was called upon to pass on the correctness of an Adjustment Board award rendered in favor of the employees less than two years before commencement of the court action. One of the questions—perhaps the principal one—before the court was whether the carrier could submit the controversy to the courts within the two year period allowed the employees to bring an enforcement suit under Sec. 3 First (p) and (q) of the Railway Labor Act (45 U. S. C. Sec. 153 First (p) and (q)). Although the court declined jurisdiction, it did not do so on the

basis that it lacked jurisdiction over a matter of interpretation of collective bargaining agreements on railways. We would regard the *Boswell* case as authority for the proposition that the courts may construe railway labor agreements under appropriate circumstances.

Elgin, J. & E. Railway Company v. *Burley,* 325 U. S. 711, 327 U. S. 661, was brought by employees to collect wages allegedly due them under a collective agreement. The main defense of the carrier was that a settlement had been made binding upon the employees. In its decision this Court held that the settlement was not conclusive on the employees unless they had authorized their representative to consummate it. The cause was remanded with instructions to the trial court to determine whether authority had in fact been given. The opinion does not reveal doubt on the part of this Court of the authority of courts to interpret the collective agreement and decide the wage claims of the employees in the event there proved to be no settlement to bar the assertion of claims.

Order of Railway Conductors v. *Pitney, supra,* has been urged as holding that resort to the Adjustment Board is exclusive and that no remedy may be found in the courts. The language of the opinion does not support such a contention; to the contrary it indicates clearly that cases concerning collective bargaining agreements on railroads may come to the courts after the Adjustment Board has acted in some fashion.

The *Pitney* dispute arose under separate collective agreements negotiated by the Order of Railway Conductors and Brotherhood of Railroad Trainmen. Both unions claimed the contractual right to supply the employees to man trains operating into a certain terminal on the employing railroad. The Conductors' union asked the court in charge of the trusteeship of the carrier not to displace its members. The Trainmen's union intervened in the action and asserted the

rights to the jobs under its contract with the carrier. In its decision this Court said:

> "We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O.R.C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a "document" in terms of the ordinary meaning of words and their position. * * * For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then. * * * Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O.R.C. can not show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand." (326 U. S. 566, 567.)

As we see this decision, this Court held simply that courts should stay the exercise of their jurisdiction to interpret railway collective agreements until the functions of the National Railroad Adjustment Board were availed of for the purpose of obtaining a construction of the contracts involved. The *Pitney* decision did not close the door of access to the courts. Rather, it contains an invitation to litigants to apply to the courts for relief in appropriate cases when prior resort has been had to the Adjustment Board.

The most recent of the cases in this Court passing upon the jurisdiction of federal and state courts to pass upon railway labor disputes is *Slocum* v. *Delaware, L. and W. R. Co., supra.* This was a suit for a declaratory judgment brought by the railroad against two railway labor organizations and was characterized by the Court as "remarkably similar" to the *Pitney* case. At the outset of the opinion reference is made to Section 3 of the Railway Labor Act conferring jurisdiction on the Adjustment Board to hold hearings, make findings, and render awards in disputes between carriers and their employees "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *." The Court stated: "The question presented is whether state courts have power to adjudicate disputes involving such interpretations *when the Adjustment Board has not acted.*" (Italics ours.)

The Court reached the conclusion "We hold that jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive." To this the Court appended this footnote:

> "We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192. Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction" (339 U. S. 244).

Mr. Justice Reed, dissenting, said:

> "The Court denies 'power in any Court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act'. It says 'that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive'. Read literally, this language would indicate that the Board in most cases

> not only has exclusive jurisdiction for the institution of proceedings to determine rights under railroad collective-bargaining agreements, but also for their final determination, i. e., that there is no judicial review of the Board's awards, except those for money. The Court, however, in note 7 states that it is not 'called upon to decide any question concerning judicial proceedings to review Board action or inaction'. *From this, I take it, that the Court means only to hold that the Board has what might be called exclusive primary jurisdiction and that the decision is to have no implications for later cases which might pose the issue of judicial review of Board 'action or inaction'.*" (Emphasis supplied.)

The rationale of the *Slocum* case, as therein stated, is that it is desirable that railroad labor disputes be decided by the specially provided agency with technical knowledge of the subject in a manner calculated to minimize friction, provocative of strikes. In the earlier *Pitney* case the Court had held that a federal bankruptcy court should exercise its equitable discretion to give the National Railroad Adjustment Board the 'first opportunity to pass on the issue'. That opportunity has been afforded the Adjustment Board in this instance.

An application for the determination of this dispute was made to the Adjustment Board (R. 733, Ex. 1; R. 758, Ex. 2-A), and under date of August 28, 1945, the First Division made a decision which reads in part as follows:

> "The question here involved should be adjusted by and between the interested organizations, i. e., Brotherhood of Railroad Trainmen, Order of Railway Conductors and Switchmen's Union of North America, as it involves classification of service on run under what seem to this Division to be conflicting agreements and facts concerning the dispute. AWARD.
>
> "Case dismissed" (Ex. 2-B).

No other construction can be placed upon this decision except that it is a refusal on the part of the Adjustment Board to determine the merits of the issues involved in the instant action. In the *Slocum* and *Pitney* cases, there had been no such application to the Adjustment Board for a determination of the dispute nor a refusal on the part of the Board to determine the dispute. This is an essential distinction between the present case and the *Slocum* and *Pitney* cases, and places this case squarely outside of the limitation of their holdings. The Adjustment Board has had "the first opportunity to pass upon the issue" under the *Pitney* decision which we do not regard as having been modified by the *Slocum* decision. We believe, therefore, that this dispute is ripe for the assumption of jurisdiction by the courts.

Apparently the court below has construed the *Slocum* decision so as to completely bar disputes over the interpretation of railway contracts from reaching the courts. Such a construction of the *Slocum* decision would be at variance with the three prior decisions of this Court heretofore discussed. And we do not believe this Court intended to overrule them without expressly so stating. Hence we submit the decision of the Court of Appeals of the State of New York in this cause is probably not in accord with the decisions of this Court.

Patently it is a matter of great importance to railroad employees whether they may have recourse to the courts for decision of disputes concerning the interpretation of their collective contracts when the Adjustment Board has declined to decide the dispute on its merits but has referred the question to the parties for settlement, which settlement negotiations have proved futile following years of effort. The question presented by the instant case so affects the relationships between employer and employee on the coun-

try's railroads and the functioning of the Railway Labor Act that it ought to be decided by this Court.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari to review the judgment of the court below should be granted.

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April 22, 1952.

APPENDIX

The following are pertinent portions of the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577, as amended June 21, 1934, c. 691, 48 Stat. 1185, U. S. C., Tit. 45, Secs. 151-163.

Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Sec. 3. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appro-

priate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the District in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

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MAY 10 1952
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 720.

THOMAS J. BRENNAN, 44 Beatrice Avenue, Buffalo, New York, as President of Lackawanna Lodge No. 715, Brotherhood of Railroad Trainmen,

A. F. WHITNEY, Cleveland 13, Ohio, as President of the Brotherhood of Railroad Trainmen of The Delaware, Lackawanna & Western Railroad Company,

J. P. CAWLEY, 20 Orchard Street, Scranton, Pennsylvania, Acting General Chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen of The Delaware, Lackawanna & Western Railroad Company System,

A. E. CUMBLER, 20 Remoleno Street, Buffalo, New York, as President of Local Lodge No. 715 of the Brotherhood of Railroad Trainmen of The Delaware, Lackawanna & Western Railroad Company,

Petitioners,

vs.

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JOHN J. SHAUGHNESSY, 1108 Oak Street, Elmira, New York, as General Chairman of the Order of Railway Conductors of America for The Delaware, Lackawanna & Western Railroad Company,

ARTHUR J. GLOVER, 3 Linwood Avenue, Buffalo, New York, as President of the Switchmen's Union of North America,

JOHN J. KINMARTIN, 13 Kermit Avenue, Buffalo, New York, as President of Buffalo Lodge No. 4, Switchmen's Union of North America,

THOMAS L. JOYCE, 2907 Birney Avenue, Scranton, Pennsylvania, as General Chairman of the Switchmen's Union of North America, for The Delaware, Lackawanna & Western Railroad Company,

HAROLD V. HEEB, 215 Greene Street, Buffalo, New York, as Local Chairman of Switchmen's Union of North America for The Delaware, Lackawanna & Western Railroad Company for the Buffalo District,

Respondents.

No. 728.

(Title continued on inside of cover)

RESPONDENT RAILROAD COMPANY'S BRIEF IN OPPOSITION TO PETITIONERS' APPLICATIONS FOR WRITS OF CERTIORARI

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THOMAS L. JOYCE, 2907 Birney Avenue, Scranton, Pennsylvania, as General Chairman of the Switchmen's Union of North America, for The Delaware, Lackawanna & Western Railroad Company,

HAROLD V. HEEB, 215 Greene Street, Buffalo, New York, as Local Chairman of Switchmen's Union of North America for The Delaware, Lackawanna & Western Railroad Company for the Buffalo District,

Respondents.

No. 728.

SWITCHMEN'S UNION OF NORTH AMERICA;

GEORGE C. SLADE, as General Chairman of the General Adjustment Committee of The Delaware, Lackawanna & Western Railroad Company of the Switchmen's Union of North America;

ARTHUR J. GLOVER, as President of the Switchmen's Union of North America;

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HAROLD V. HEEB, as Local Chairman of the Switchmen's Union of North America for The Delaware, Lackawanna & Western Railroad Company for the Buffalo District,

Petitioners,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY;

THOMAS J. BRENNAN, as President of Lackawanna Lodge No. 715, Brotherhood of Railroad Trainmen;

A. F. WHITNEY, as President of the Brotherhood of Railroad Trainmen of The Delaware, Lackawanna & Western Railroad Company;

J. P. CAWLEY, Acting General Chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen of The Delaware, Lackawanna & Western Railroad Company System;

A. E. CUMBLER, as President of Local Lodge No. 715 of the Brotherhood of Railroad Trainmen of The Delaware, Lackawanna & Western Railroad Company;

JOHN J. SHAUGHNESSY, as General Chairman of the Order of Railway Conductors of America for The Delaware, Lackawanna & Western Railroad Company;

BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

RESPONDENT RAILROAD COMPANY'S BRIEF IN OPPOSITION TO PETITIONERS' APPLICATIONS FOR WRITS OF CERTIORARI.

Opinions Below.

The opinion of the state Supreme Court (R. 99-113) is reported at 91 N. Y. S. 2nd. 376. The Memorandum decision of the Appellate Division of the Supreme Court for the Fourth Department (R. 651) is reported at 278 App. Div. (N. Y.) 886, case 2. The opinion of the Court of Appeals of the State of New York (R. 657-677) is reported at 303 N. Y. 411.

Question Presented.

Whether Congress conferred *exclusive jurisdiction* upon the National Railroad Adjustment Board pursuant to the provisions of the Railway Labor Act (48 Stat. 1185; 45 U. S. C. A. 151 *et seq.*), to determine disputes between organizations of employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions? Respondent Railroad Company contends that this question has been affirmatively answered by this Court in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, and *Order of Conductors v. So. R. Co.*, 339 U. S. 255.

Statute Involved.

The pertinent provisions of the Railway Labor Act are set forth in the appendices to the two petitions at pp. 29-33 (Brennan) and 15-16 (Switchmen's Union) and in the appendix of this brief.

Statement.

This litigation concerns a controversy between rival Railroad Unions (the plaintiff Trainmen and the defendant Switchmen), necessarily involving the defendant Railroad, as to which union is entitled to furnish employee-members to man certain railroad operations or "runs" in the Buffalo yard of the Railroad Company, known collectively as the "3:00 P. M. City Line Job" and the "7th Day Extra Job".

Prior to a wildcat strike of the Switchmen's Union in 1920, the yard service members of this union manned all operations in the Buffalo yard, while the road service members of the Trainmen's Brotherhood manned all road operations outside of the Buffalo yard. As a result of the strike, the Switchmen surrendered its contract, which was immediately taken over by the Trainmen. This organization subsequently continued to furnish employees not only for road service, but in addition, for yard service in the Buffalo yard as well.

This situation continued until 1935 when an election was held under the auspices of the National Mediation Board. At this election, held to determine whether the defendant Switchmen should again represent yardmen in the Buffalo District, only yardmen, including the "crew" on the "City Line Job", were allowed to vote.

With the election won, defendant Switchmen entered into the 1935 "Memorandum" agreement with the Railroad, and again became the bargaining representative for employees in yard service. Although plaintiff Trainmen contend that the character of the operations in the Buffalo Yard changed from yard service to road service subsequent to 1935, this question of fact was resolved against it by a finding of the Trial Court (R. 111).

After this reinstatement of Switchmen, both unions attempted to clarify the status of the Buffalo Yard. First, in 1938, the Switchmen invoked the jurisdiction of the National Mediation Board in an effort to be the designated representative of all employees in the Buffalo Yard, whether they had been characterized as the result of the wildcat strike as in road service or yard service. This would have eliminated all road service members of Trainmen from any work in the yard, including the "7th Day Extra Job" involved in this case. The Board dismissed the case, and held that the Switchmen's Union was not entitled to represent these employees because they had been excluded from the election which certified the Switchmen's Union.

Next, in 1944, the Trainmen filed a claim with the Railroad Adjustment Board based upon the grievance of two of its trainmen members in connection with the "City Line Job". In its Award No. 10841, dated August 28, 1945, among others, the Board made the following findings:

> "This Division of the Adjustment Board *has jurisdiction* over the dispute involved herein. * * *
>
> "The question here involved should be adjusted by and between the interested organizations, i. e., Brotherhood of Railroad Trainmen, Order of Railway Conductors and Switchmen's Union of North America, as it involves classification of service on run under what seem to this Division to be conflicting agreements and facts concerning the dispute."
>
> "AWARD: CASE DISMISSED".
>
> (Italics ours.)
>
> (See Appendix.)

Both petitioners recite the fact that thereafter, attempts were made to adjust the controversy between the two unions pursuant to the decision of the Railroad Adjustment Board, but that these were "unproductive".

No steps were taken by either petitioner union after the award of the Railroad Adjustment Board, to re-submit the controversy to that Board, or to avail themselves of the other arbitration or mediation provisions of the Railway Labor Act (45 U. S. C. A. § 153 First (1), (m) and § 157).

Instead, the plaintiff Trainmen instituted this action for a declaratory judgment and an injunction, interpreting and enforcing their contract. The Trial Court, following the *Slocum* case in the New York Court of Appeals before its reversal by this Court, held solely upon the basis of that case that the State Court has jurisdiction of the controversy (R. 110). *However, it defeated both unions on the facts, and made findings in accordance with the then existing contract interpretations of defendant Railroad Company, viz.: The "3:00 P. M. City Line Job" belonged to the Switchmen, and the "7th Day Extra Job" to the Trainmen.*

At the time of the appeal to the Appellate Division by both unions, the decision of the Court of Appeals in the *Slocum* case had been reversed. Consequently, in reliance upon that case, the complaint and counterclaim of both unions were dismissed with a holding that the Court had no jurisdiction because of the exclusive jurisdiction of the Railroad Adjustment Board. The New York Court of Appeals in a long opinion reached the same result (R. 657-677).

ARGUMENT.

I.

The decision of the New York Court of Appeals in this case is expressly in accord with applicable decisions of this Court and particularly with its decisions in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, and Order of Conductors v. So. R. Co., 339 U. S. 255.

Petitioners claim jurisdiction for certiorari under Title 28 U. S. C. A. § 1257 (3). However, under Rule 38, Subdivision 5 (a), their claim falls, since the Court of Appeals affirmed the dismissal of the complaint and the counterclaim expressly in accord with the applicable decisions of this Court. The opinion of Fuld, J. states:

> "Since the type of controversy in the Slocum case is remarkably similar to that here involved, it follows that the Board's jurisdiction of the present dispute is likewise 'exclusive'." (R. 673.)

In so stating, the Court followed the reasoning of Mr. Justice Black in the Slocum case at page 244:

> "This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act."

Later on, on the same page, he states:

> "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the *Moore* case does not conflict with this decision, and no contrary inference should be drawn from any language in the *Moore* opinion. It was error for the New York Courts to uphold a declaratory judgment interpreting these collective-bargaining agreements."

Both petitioners attempt to differentiate the holding in the *Slocum* case upon two grounds: (1) That there the court action was taken *before* the dispute had been presented to the National Railroad Adjustment Board, and (2) upon Footnote No. 7 of the majority opinion at page 244 which states:

> "Nor are we called upon to decide any question concerning judicial proceedings to review Board action or inaction."

Significantly, neither petitioner advances a single argument on principle indicating any compelling reason for any distinction based on a prior or later application to the Adjustment Board.

It is submitted that the decision of this Court in the *Slocum* case was not based upon whether the controversy had or had not been taken to the Board prior to the institution of the action. Rather, it was based upon the effective machinery of the Railway Labor Act to determine and decide "disputes concerning the making of collective agreements and to grievances arising under existing agreements" (p. 242). Emphasis was placed in the decision upon the effective machinery for "conciliation, mediation, arbitration and adjustment of disputes * * * if negotiations failed" (p. 242). Finally, the Board's facility to handle "this type of grievance" was recognized at page 243:

> "Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

While in the *Slocum* case it is true that neither union had sought prior relief from the Adjustment Board, the

fact that this is not germane is clearly indicated in the decision of the Court on the same day in the *Southern Railway Company* case. There, "a petition for hearing and award before the Adjustment Board" was filed "after the railroad had sued in the state court". In the opinion reaffirming the exclusive jurisdiction of the Board, the Court stated at page 256:

> "For reasons set out in the *Slocum* case, *ante*, p. 239 we hold that the South Carolina state court was without power to interpret the terms of this agreement and adjudicate the dispute. We discuss this case separately because it sharply points up the conflicts that could arise from state court intervention in railroad-union disputes. After the railroad had sued in the state court, the union filed a petition for hearing and award before the Adjustment Board. The state court nevertheless proceeded to adjudicate the dispute. *Sustaining the state court's action would invite races of diligence whenever a carrier or union preferred one forum to the other.* And if a carrier or a union could choose a court instead of the Board, the other party would be deprived of the privilege conferred by § 3 First (i) of the Railway Labor Act, 48 Stat. 1191, 45 U. S. C. § 153 First (i), which provides that after negotiations have failed 'either party' may refer the dispute to the appropriate division of the Adjustment Board." (Italics ours.)

That the distinction as to whether or not the Board has acted is purely artificial and of no moment was indicated in *New Orleans Public Belt Railroad Commission v. Ward*, 182 F. 2d. 654 (1950) (Ct. App. 5th Cir.). At page 656, the Court stated:

> "It has been recently again determined in principle by the Supreme Court in the case of Marion Slocum v. Delaware, Lackawanna & Western Railroad Co., 339 U. S. 239, 70 S. Ct. 577, 584. It is true that in that case the suit was brought in the state court and before the Board had acted, instead of, as here, in the federal court and after it had acted, but the language and scope

> of the decision is conclusive authority for the view that we take, that the complaint does not present a justiciable declaratory judgment controversy."

Other federal courts have indicated that the only jurisdiction remaining in courts is "when collective bargaining agreements are unlawfully entered into, or when the agreements themselves are unlawful in terms or effect * * * ".

Hettenbaugh, et al. v. Airline Pilots Association International, 189 F. 2d 319, (5th Cir. 1951).

Hayes v. Union Pacific R. Co., 184 F. 2d 337, (9th Cir. 1950).

See also:

Kendall v. Pennsylvania R. R. Co., 94 F. Supp. 875, (N. D. Ohio 1950).

Michel v. Louisville & N. R. Co., 188 F. 2d 224, (5th Cir. 1951).

Petitioners can obtain no comfort from Footnote No. 7 at page *244* of the *Slocum* case, since the instant litigation clearly does not raise any "question concerning judicial proceedings to *review* Board action or inaction". This was recognized by the Court of Appeals:

> "But the court's reservation of that question is not relevant here, since plaintiff is seeking, not a review of an administrative decision, but a trial of the facts *de novo.*" (R. 674).

The argument advanced by petitioners that the Court of Appeals' decision leaves both unions without a remedy is specious. Neither union has made any attempt to re-submit the controversy to the Adjustment Board, nor to take any steps whatever in regard to arbitration or mediation under the act. Indeed, the Court of Appeals expressly took notice of this proper procedure when it cited the making of an Award by the Adjustment Board in the same controversy

after the decision of the Supreme Court in *Order of Conductors v. Pitney,* 326 U. S. 561, had rendered further court action for the unions impossible. (See Decision, Fuld, J. R. 676.)

Petitioner Switchmen's argument based on its interpretation of the *Pitney* case is conclusively answered by the *Slocum* case, as pointed out by Mr. Justice Reed at page 251 of his dissent:

> "Today the Court is compelled to extend the *Pitney* precedent from 'discretion' to 'jurisdiction' because federal courts lack power to order state courts to exercise in a particular manner their equitable discretion."

Despite the comments of petitioners on the cases of *Washington Terminal Company v. Boswell,* 124 F. 2d 325, (D. C. Cir. 1941), 319 U. S. 732 and *Elgin, J. & E. Railway Co. v. Burley,* 325 U. S. 711, 327 U. S. 661, they are not in point. This explains petitioners' vague and nebulous references to these cases, and the urging that these are pertinent "under appropriate circumstances", with no attempt to define the circumstances.

II.

Plaintiff Trainmen are confused in claiming violations of their constitutional rights solely on the basis of the state court's decision.

Plaintiff Trainmen argue under Points II and III of their brief, that the decisions of the state court violated Article VI of the Constitution and the "due process" clause of the Fourteenth Amendment. No claim is made that any statute is unconstitutional.

Translated into elementary language, this seems to constitute a claim by the plaintiff Trainmen that the decisions of two New York Appellate Courts denying jurisdiction in express accord with the decisions of this Court, constitute an unconstitutional act. Actually, plaintiff Trainmen merely restate the claim that the Railway Labor Act and the *Slocum* case do not deny the state courts jurisdiction in this type of controversy.

Plaintiff Trainmen do not assert that the Railway Labor Act is unconstitutional. To raise the claim of a violation of constitutional rights, it is assumed that there is a *deprivation of a forum* for a determination of the union's rights. In so assuming, the fact is ignored that the National Railroad Adjustment Board may have acted beyond its powers in its award dismissing the voluntary submission of the dispute without passing on the merits. But, the authority of the Board to act as it did is not now before this Court. It can only be raised, if at all, by proceeding *through* the Board to the courts.

Conclusion.

Both petitions for writs of certiorari should be denied.

Respectfully submitted,

ROWLAND L. DAVIS, JR.
HUGH McM. RUSS.
ROBERT H. DALEY.

APPENDIX.

The following pertinent provision of the Railway Labor Act of May 20, 1926, c. 347 § 3, 44 Stat. 578, as amended June 21, 1934, c. 691 § 3, 48 Stat. 1189, 45 USCA Sec. 153 (1), has been omitted from the appendices of both petitioners' briefs:

> "Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees."

The following (R. 254) (Exhibit 2-B) is Award No. 10841 of the National Railroad Adjustment Board, dated August 28, 1945:

> "FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:
>
> "The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.
>
> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The question here involved should be adjusted by and between the interested organizations, i. e., Brotherhood of Railroad Trainmen, Order of Railway Conductors and Switchmen's Union of North America, as it involves classification of service on run under what seem to this Division to be conflicting agreements and facts concerning the dispute."

"AWARD: CASE DISMISSED."

Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 24 1952
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1952.

No. 720.

THOMAS J. BRENNAN, 44 Beatrice Avenue, Buffalo, New York, as President of Lackawanna Lodge No. 715, Brotherhood of Railroad Trainmen,

A. F. WHITNEY, Cleveland 13, Ohio, as President of the Brotherhood of Railroad Trainmen of The Delaware, Lackawanna & Western Railroad Company,

J. P. CAWLEY, 20 Orchard Street, Scranton, Pennsylvania, Acting General Chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen of The Delaware, Lackawanna & Western Railroad Company System,

A. E. CUMBLER, 20 Remoleno Street, Buffalo, New York, as President of Local Lodge No. 715 of the Brotherhood of Railroad Trainmen of The Delaware, Lackawanna & Western Railroad Company,

Petitioners,

vs.

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GEORGE C. SLADE, 1516 Nielson Avenue, Utica, New York, as General Chairman of the General Adjustment Committee of The Delaware, Lackawanna & Western Railroad Company of the Switchmen's Union of North America,

JOHN J. SHAUGHNESSY, 1108 Oak Street, Elmira, New York, as General Chairman of the Order of Railway Conductors of America for The Delaware, Lackawanna & Western Railroad Company,

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Respondents.

No. 728.

(Title continued on inside of cover)

Brotherhood of Railroad Trainmen's Brief in Opposition to Petitioner Switchmen's Brief in Application for Writ of Certiorari and Reply Brief to Respondent Railroad Company's Brief in Opposition to Trainmen's (Case No. 720) and Switchmen's (Case No. 728) Applications for Writs of Certiorari.

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GEORGE C. SLADE, as General Chairman of the General Adjustment Committee of The Delaware, Lackawanna & Western Railroad Company of the Switchmen's Union of North America;

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BROTHERHOOD OF RAILROAD TRAINMEN,

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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 720.

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BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

Brotherhood of Railroad Trainmen's Brief in Opposition to Petitioner Switchmen's Brief in Application for Writ of Certiorari and Reply Brief to Respondent Railroad Company's Brief in Opposition to Trainmen's (Case No. 720) and Switchmen's (Case No. 728) Applications for Writs of Certiorari.

Statement.

To avoid the confusion that might arise as a result of the multiplicity of parties and the interchanging of designation of the two petitions for Certiorari (No. 720 and No. 728) the parties involved will hereinafter be referred to as follows:

(1) Petitioner and Respondent Brotherhood of Railroad Trainmen as Plaintiff Union or Trainmen, (2) Petitioner-Respondent Switchmen's Union of North America as Defendant Switchmen's Union or Switchmen's Union, (3) Respondent Delaware, Lackawanna & Western Railroad as Defendant Railroad, Defendant Carrier, Railroad, or Carrier, and (4) Respondent Order of Railway Conductors as Conductors.

Omissions and inaccuracies deemed necessary to correct Defendant Switchmen's petition and brief for Certiorari to This Court in case No. 728 and Defendant Railroad's statement and brief in answer to Switchmen's Case No. 728 and Trainmen's petition for Certiorari in case No. 720.

1. Defendant Railroad, by its question presented, and answer thereto on Page 2 shows it has erroneously substituted the facts of two cases heretofore decided by this Court for the different and additional facts of the present case.

2. On Page 3 it erroneously substitutes for Plaintiff Union's contract—(a) an indicated, non-existent contract

between Plaintiff Union and Defendant Switchmen's Union, and/or (b) a never existent Switchmen's surrendered contract "which was immediately taken over by the Trainmen." As discussed and argued in Plaintiff Union's application for Certiorari in case No. 720, Plaintiff Union's claim to the 3:00 P. M. City Line Job is derived from Defendant Carrier's May 26th, 1920 joint contract with the Conductors and Trainmen as quoted on pp. 34 and 35 of the appendix to plaintiff's petition. (Finding 3 of Pltfs. Ex. 5, R. 251.) That same contract was thereafter renewed and adopted as an appendix to the 1926-Main-Line-Road-Service contract between the same parties. (pp. 33, 34 of Ex. 4, R. 250.)

3. For Plaintiff Union's aforesaid contract, Defendant Switchmen on Page 4 of the petition erroneously substituted a separate, distinct, nonapplicable and extinct 1926 yard contract of the Brotherhood of Railroad Trainmen. That contract (Ex. B. R. 262) prior to January 1st, 1921 covered only employees engaged in yard work in yards of Defendant Railroad, east of Pt. Morris. (Finding 1, Pltfs. Ex. 5, R. 251.) As of January 1st, 1921 that yard contract was extended to include only that portion of the Buffalo district Switchmen who, after surrender of the Switchmen's Union contract for the Buffalo terminal on May 17th, 1920, continued to work without a contract. By the extension of that contract, that portion of Buffalo District Switchmen so included, were limited to "switching" or "breaking-up trains" in the various yards of Defendant Railroad in the Buffalo area and were excluded from performing the road service awarded Conductors and Trainmen by their May 1920 Buffalo-District-Road-service contract. (Ex. AA in Ev. R. 312.) That agreement was revised in 1926 and by Article 36 thereof the Switchmen in the Buffalo District

were again precluded from performing road service work in the Buffalo District given to the Conductors and Trainmen. It was that 1926 yard contract, and only that contract, which was legally destroyed by the August 31st, 1935 certification of the National Mediation Board (Finding 5, Ex. 5, R. 251) and the letter of August 8th, 1935 (Ex. C., R. 306) to only the Chairman of the Brotherhood of Railroad Trainmen and Chairman of Defendant Switchmen's Union.

4. Defendant Railroad, at pp. 2 and 5 of its opposing brief erroneously seeks to resurrect and place in issue before This Court an obvious contrary-to-proof finding of the Referee that Plaintiff Union's May 1920 road service contract, as renewed and adopted as an appendix in 1926, was abrogated by the heretofore mentioned August 8th, 1935 letter. (Ex. C, R. 306; R. 111, 112, 113.) That contrary-to-proof erroneous finding of the Referee was detected, corrected and nullified by the Court of Appeals when it ruled that Plaintiff Union's aforesaid contract and Defendant Switchmen's October 15th, 1935, contract (Ex. DD, R. 578) were "concededly legal and valid" and "covered identical jobs" (R. 670; p. 6 of Trainmen's petition for Certiorari in case No. 720).

5. Defendant Switchmen and Defendant Railroad recited that Plaintiff Union contended that the character and nature of the work on the 3:00 P. M. City Line Job changed from one of switching to one of road service in 1937.

That such is contrary to Plaintiff Union's undisputed, decisive and determinative proof and went beyond a contention, is conclusively shown by the following exhibits and record identification thereof: 2-A in Ev., 253; Ex. 2-B in Ev., 254; Ex. 6 in Ev., 252; Ex. 7 in Ev., 258, 429 and

430; Ex. 12 in Ev., 340; Ex. 13 in Ev., 420; Ex. 14 in Ev., 422; Ex. 15 in Ev., 424; Ex. 16 in Ev., 426; Ex. 17 in Ev., 428; Ex. 18 in Ev., 445; Ex. 19 in Ev., 529; Ex. G in Ev., 441.

The switching employees engaged in working on the 3:00 P. M. City Line Job, in their daily time slips, in a blank space so provided therefor, designated their work as road service. (Ex. 18 in Ev., R. 445.) The Railroad's T-24 records show the 3:00 P. M. City Line Job is one of road service. Those records show the number of cars transferred to and from various junctions and also cars spotted or picked up at adjoining industrial plants. (Ex. 12 in Ev., R. 340.) The employees engaged in switching wrote only the word "switching" on the face of their T-24 and a designation of the yard in the Buffalo District. (R. 381, 382.)

All those records which would have shown that the job in question changed from one of switching to road service in 1937 were destroyed by Defendant Railroad in 1943. (R. 324, 326, 327.) The destruction thereof took place after the Conductors had submitted their claim to the 3:00 P. M. City Line Job in 1939 and while that claim was still pending before the Adjustment Board. When Plaintiff Union presented their claim to the Adjustment Board in 1944, those records were not available. (Ex. 7 in Ev., R. 258, 429 and 430; Ex. 19 in Ev., R. 529; R. 253, 254, 440.) Undisputed oral proof showing such change was also produced. (R. 240, 243, 375, 381, 382, 393, 396, 397, 398) (R. 240, 243; 375, 393, 398; 405, 406; 408; 415, 416; 427, 428; 428.)

6. Defendant carrier at page 5 emphasizes that Plaintiff Union had not resubmitted the controversy involved to the Adjustment Board. As pointed out in Plaintiff Union's petition and brief for Certiorari to This Court in

case No. 720 (pp. 7 through 36), the Trainmen were legally precluded from so resubmitting such case.

Defendant carrier obviously recognized the futility of resubmission of the dispute to the Adjustment Board, otherwise it, itself would have attempted to circumvent the "command" of Provision (i), subdv. 1st, § 153, 45 U. S. C. A. of the Railway Labor Act. (Switchmen's Union of North America and others vs. National Mediation Board and others. 320 U. S. 297, 304; Elgin, J. & E. R. Co. vs. Burley 325 U. S. 711, 727.) Washington Terminal Company vs. Boswell, 124 F. 2d 235, 242, (C. A. D. C. 1941) affirmed by a divided court, 319 U. S. 732.)

Defendant Switchmen's Union, not being legally eligible to intervene in the case before the Adjustment Board, could not resubmit such dispute, but either Defendant Railroad or Defendant Switchmen's Union, or both, could have submitted the Switchmen's contract to the Adjustment Board for interpretation and adjudication of the dispute. (Order of R. R. Tel. v. New Orleans, Texas & Mex. Ry. Co., 156 F. 2nd 1, 5. Certiorari denied, 329 U. S. 728, re-hearing denied, 329 U. S. 829.)

Refusal of Defendant Switchmen's Union and the Conductors to acknowledge Plaintiff Union's request to resolve the dispute involved through arbitration, in accordance with the Adjustment Board's suggestion, (R. 302) eliminated possibility of settlement of the dispute through arbitration.

Such arbitration under Section 157 of the Railway Labor Act necessitated agreement, but provided that failure to so agree was no violation of a legal obligation under the Act.

7. In its conclusion to its "question presented" on Page 5 of its petition Defendant Switchmen's Union errone-

ously assumes that the Adjustment Board's action amounted to "a Board award rendered, declining to decide the dispute on its merits but referring the question to the parties for settlement?"

As pointed out in Plaintiff Union's petition and brief for Certiorari in case No. 720 (pp. 7 through 26) the Adjustment Board, acting within its Congressionally conferred limited jurisdiction, dismissed the claim without making an award. On finding that a contract was clear and unambiguous and therefore not susceptible to interpretation, that Tribunal was, because of its limited jurisdiction, legally forced to dismiss, without making an award. It was not jurisdictionally empowered to alter, amend or make a new agreement for the purpose of making an award. It could however, as it did in this case, without exceeding its jurisdiction, suggest a settlement of a dispute where concededly legal agreements covered an identical job. Such a suggestion "to avoid any interruption to commerce" is in accordance with the purpose and policy of the Railway Labor Act.

8. Defendant Railroad erroneously claims that "Plaintiff Trainmen instituted this action for a declaratory judgment and injunction, interpreting and enforcing their contract." Having eliminated the possibility of adjudication of its claim through interpretation of its contract by the Adjustment Board, Plaintiff Union's action is now based on a breach of its contract.

9. On pages 8 and 10 of its opposing brief Defendant Railroad erroneously recites:

> " • • • Indeed, the Court of Appeals expressly took notice of this proper procedure when it cited the making of an Award by the Adjustment Board in the same

> controversy after the decision of the Supreme Court in Order of Conductors v. Pitney, 326 U. S. 561, had rendered further court, action for the unions impossible. (See Decision, Fuld, J. R. 676.)

Two inaccuracies are presented by that statement. The falsity of that statement that the Court of Appeals " • • • cited the making of an award by the Adjustment Board in the same controversy after the decision of the Supreme Court in Order of Conductors, *supra,*" can be determined by looking at pages 15 and 16 of Award No. 14673. That was an otherwise unidentified photostatic copy which was first presented to the Court of Appeals at the time of argument of this case before that Court. This situation has been pointed out on pp. 20, 21 and 22 of Plaintiff Union's petition for Certiorari to This Court in case No. 720.

As to the second inaccuracy, This Court, in Order of Conductors v. Pitney, 326 U. S. 561 did not render further court action for the unions impossible. What it did was to order the case held in abeyance by the Court until after the Adjustment Board had acted. At page 567, in discussing the power of the courts of equity to intervene after the Adjustment Board had acted, this Court said:

> "Under these circumstances *the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue.* Certainly the extraordinary relief of an injunction should be withheld, at least, until then. See *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 483-484; *Burford v. Sun Oil Co.*, 319 U. S. 315. Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O. R. C. can not show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand."

10. To support its position Defendant Railroad in its opposing brief, relies on three cases which were not discussed in Petitioner Trainmen's brief for Certiorari in case No. 720. They were:

Order of Railway Conductors of America vs. Southern Railroad, 339 U. S. 255;

Kendall v. Pennsylvania R. R. Co., 94 F. Supp. 875 and

Michel v. Louisville & N. R. Co., 188 F. 2d 224, (5th Cir. 1951).

Those three cases only support Plaintiff Union's contention in this case. Order of Railway Conductors of America, *supra,* only emphasized the ruling in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, wherein This Court, at page 244, answered in the negative, the following question presented at page 240.

> "The question presented is whether state courts have power to adjudicate disputes involving such interpretation WHEN THE ADJUSTMENT BOARD HAS NOT ACTED." (Emphasis supplied.)

The Kendall case, *supra,* was an action for breach of a labor contract. Plaintiff did not follow grievance procedure outlined in labor contract entered into between his union and defendant, and did not take his complaint to National Adjustment Board. The Court held that it was without jurisdiction to order defendant to reinstate plaintiff with back pay and seniority rights, but that since plaintiff also asked for damages for breach of collective bargaining agreement on ground of wrongful discharge, plaintiff could amend his complaint to state his cause of action for damages only.

The Michel case, *supra,* was one wherein a discharged railroad employee having voluntarily presented and

prosecuted his claim against employer for alleged unjustified discharge before National Railroad Adjustment Board as authorized under Railway Labor Act, waived the right to assail the constitutional validity of manner and extent of redress afforded by terms of the Act under which he proceeded. Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*

11. The Switchmen's Union cited only one case not cited and discussed in Plaintiff Union's brief for Certiorari in case No. 720. That was Washington Terminal Company vs. Boswell, 124 F. 2d 235 aff'd by a divided court 319 U. S. 732. That case only supported Plaintiff Union's contention that the review of the Adjustment Board was limited solely to cases involving an award as provided by Provision (p) of Subdv. 1 of § 153, 45 U.S.C.A. of the Railway Labor Act.

12. Defendant Railroad and Switchmen's Union in this case seek to nullify the purpose of the Railway Labor Act, to the detriment and prejudice of some three million Railroad workers and their families dependent thereon for protection of their rights under their Carrier-Union contracts. This Court in the Slocum case, *supra,* by its footnote citation at p. 243 directed attention to "The Railroad World", as follows:

> "The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making * * *. This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established." (Garrison, The Railroad Adjustment Board: A Unique Administrative Agency (1937) 46 Yale L. J. 567, 56-69.)

Conclusion.

It is respectfully submitted that the Brotherhood of Railroad Trainmen's petition for a writ of Certiorari (Case No. 720) to review the judgment of the Court below should be granted.

Respectfully submitted,

THOMAS J. McKENNA.